Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

*v.*

FLAMINGO INDUSTRIES (U.S.A.) LTD.
AND ARTHUR WAH

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*
ROBERT D. MCCALLUM, JR.
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
LISA S. BLATT
*Assistant to the Solicitor General*
MARK B. STERN
R. CRAIG GREEN
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

The federal antitrust laws apply to a "person," which is defined to include "corporations and associations existing under or authorized by the laws of * * * the United States." 15 U.S.C. 7 (Sherman Act), 12(a) (Clayton Act). The question presented is whether the United States Postal Service is a "person" amenable to suit under the antitrust laws.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statutory provisions involved | 2 |
| Statement | 2 |
| Reason for granting the petition | 4 |
| A. The court of appeals' decision conflicts with *United States* v. *Cooper* and appellate decisions holding that the United States and its agencies and instrumentalities are not persons subject to suit under the antitrust laws | 5 |
| B. The court of appeals' decision conflicts with *FDIC* v. *Meyer* and other appellate decisions holding that Congress's waiver of a federal agency's sovereign immunity from suit does not create a cause of action against the agency | 12 |
| C. The court of appeals' decision threatens to impose unwarranted costs and liabilities on the Postal Service | 17 |
| Conclusion | 20 |
| Appendix A | 1a |
| Appendix B | 23a |
| Appendix C | 25a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Air Courier Conf.* v. *American Postal Workers Union*, 498 U.S. 517 (1991) | 9, 18 |
| *Baker* v. *Runyon*, 114 F.3d 668 (7th Cir. 1997), cert. denied, 525 U.S. 929 (1998) | 15, 17 |
| *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) | 13 |
| *Champaign-Urbana News Agency, Inc.* v. *J.L. Cummins News Co.*, 632 F.2d 680 (7th Cir. 1981) | 11 |

Cases—Continued: Page

*Department of Water & Power* v. *Bonneville Power Admin.*, 759 F.2d 684 (9th Cir. 1985) ..... 11
*Emery Worldwide Airlines, Inc.* v. *United States*, 264 F.3d 1071 (Fed. Cir. 2001) ..... 4
*EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976) ..... 6
*FDIC* v. *Meyer*, 510 U.S. 471 (1994) ..... 3, 5, 6, 13, 14, 15, 16, 17
*FHA* v. *Burr*, 309 U.S. 242 (1940) ..... 14
*Franchise Tax Bd.* v. *United States Postal Serv.*, 467 U.S. 512 (1984) ..... 14
*Greenwood Util. Comm'n* v. *Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985) ..... 10
*International Primate Prot. League* v. *Tulane Educ. Fund*, 500 U.S. 72 (1991) ..... 6
*Jet Courier Servs., Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221 (6th Cir. 1983) ..... 10
*Loeffler* v. *Frank*, 486 U.S. 549 (1988) ..... 14, 15
*Name.Space, Inc.* v. *Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000) ..... 10
*Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425 (1997) ..... 7
*Rex Sys., Inc.* v. *Holiday*, 814 F.2d 994 (4th Cir. 1987) ..... 10
*Robinson* v. *Runyon*, 149 F.3d 507 (6th Cir. 1988) ..... 15, 16
*Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), cert. denied, 475 U.S. 1081 (1986) ..... 11
*Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982) ..... 3, 9, 10, 11
*Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985) ..... 20
*United States* v. *Cooper Corp.*, 312 U.S. 600 (1941) ..... 3, 4, 5



Cases—Continued: Page

*United States Postal Serv.* v. *Council of Greenburgh Civic Ass'n*, 453 U.S. 114 (1981) ..... 4, 7
*Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S 765 (2000) ..... 6
*Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) ..... 6
*Young, In re*, 869 F.2d 158 (2d Cir. 1989) ..... 17

Constitution and statutes:

U.S. Const. Art. I, § 8, Cl. 7 ..... 7
Act of Sept. 22, 1789, ch. 16, 1 Stat. 70 ..... 7
Act of Mar. 3, 1845, ch. 43, § 10, 5 Stat. 736 ..... 7
Act of June 8, 1872, ch. 335, 17 Stat. 283 ..... 7
Act of July 7, 1955, Pub. L. No. 84-137, 69 Stat. 282 ..... 9
Administrative Procedure Act, 5 U.S.C. 702 ..... 11
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... 14-15, 16, 17
§ 717, 42 U.S.C. 2000e-16 ..... 15
Clayton Act, 15 U.S.C. 12 *et seq.*:
15 U.S.C. 15(a) ..... 18
15 U.S.C. 15a (Supp. III 1956) ..... 9
Clean Water Act, 33 U.S.C. 1362(5) ..... 6
False Claims Act, 31 U.S.C. 3729 ..... 6
Lanham Act, 15 U.S.C. 1127 ..... 6
Postal Reogranization Act of 1970, Pub. L. No. 91-375, 1 Stat. 719 (39 U.S.C. 101 *et seq.*) ..... 7
39 U.S.C. 101(a) ..... 8, 31a
39 U.S.C. 201 ..... 4, 8, 33a
39 U.S.C. 202 ..... 8
39 U.S.C. 202(a) ..... 8
39 U.S.C. 202(c) ..... 8
39 U.S.C. 202(d) ..... 8
39 U.S.C. 205(d) ..... 8
39 U.S.C. 401(1) ..... 2, 13, 15, 16, 17, 33a
39 U.S.C. 401(9) ..... 8, 34a
39 U.S.C. 401(10) ..... 19, 34a

Statutes—Continued: Page


39 U.S.C. 403 ..... 18
39 U.S.C. 404(7) ..... 8
39 U.S.C. 407 ..... 8
39 U.S.C. 410 ..... 8
39 U.S.C. 601-606 ..... 9
39 U.S.C. 1001 ..... 8
39 U.S.C. 1011 ..... 8
39 U.S.C. 2001 ..... 8, 19
39 U.S.C. 2003 ..... 8, 19
39 U.S.C. 2006(c) ..... 8
39 U.S.C. 2008(c) ..... 8, 19
39 U.S.C. 3621 ..... 18
Sherman Act, 15 U.S.C. 1 *et seq.*:
15 U.S.C. 1 ..... 18
15 U.S.C. 2 ..... 18
15 U.S.C. 7 ..... 8, 30a
7 U.S.C. 942 ..... 12
7 U.S.C. 1506 ..... 12
12 U.S.C. 341 ..... 11, 12
12 U.S.C. 635(a)(1) ..... 12
12 U.S.C. 1441a(a)(5)(J) ..... 12
12 U.S.C. 1441(b)(9)(E) ..... 12
12 U.S.C. 1725(c)(4) (1988) ..... 13
12 U.S.C. 1789(a)(2) ..... 12
12 U.S.C. 1819 ..... 12
12 U.S.C. 2013(4) ..... 12
12 U.S.C. 2073(4) ..... 12
12 U.S.C. 2093 ..... 12
12 U.S.C. 2278a-3 ..... 12
12 U.S.C. 2278b-4 ..... 12
12 U.S.C. 2279aa-3 ..... 12
12 U.S.C. 2289(1) ..... 12
15 U.S.C. 13a ..... 18
15 U.S.C. 634(b)(1) ..... 12
15 U.S.C. 714b ..... 12
18 U.S.C. 1693-1699 ..... 9




Statutes—Continued: Page


22 U.S.C. 290f ..... 12
22 U.S.C. 2199(d) ..... 12
28 U.S.C. 1442(a)(1) (1988) ..... 6
28 U.S.C. 1491(b)(1) ..... 4
28 U.S.C. 2402 ..... 17
29 U.S.C. 1302(b)(1) ..... 12
42 U.S.C. 1981a(b)(1) ..... 16
42 U.S.C. 1983 ..... 6
Miscellaneous:
United States Postal Service:
*2002 Annual Report* ..... 18, 19
*Transformation Plan* (Apr. 2002) ..... 18, 19

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## PETITION FOR A WRIT OF CERTIORARI

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The Solicitor General, on behalf of the United States Postal Service (Postal Service), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 302 F.3d 985. The opinion of the district court (App., *infra*, 23a-27a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 23, 2002. A petition for rehearing was denied on November 4, 2002 (App., *infra*, 28a-29a). On January 23, 2003, Justice O'Connor extended the time

within which to file a petition for a writ of certiorari to and including March 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App., *infra*, 30a-34a.

## STATEMENT

1. Flamingo Industries (USA) Ltd. (Flamingo), a manufacturer of mail sacks, and its owner, Arthur Wah, brought suit in the United States District Court for the Northern District of California against the Postal Service in connection with the Postal Service's termination of a contract with Flamingo to produce U.S. Mail sacks. In addition to asserting claims under the federal procurement laws and state law, the complaint stated five federal antitrust claims, alleging that the Postal Service sought to suppress competition and create a monopoly in mail sack production by procuring cheaper mail sacks that were manufactured in Mexico. The district court dismissed the complaint in its entirety. App., *infra*, 23a-27a. It dismissed the antitrust claims on the ground that Congress did not intend to impose antitrust liability on the Postal Service. *Id.* at 23a-24a. The district court explained that, although Congress has waived the Postal Service's sovereign immunity in 39 U.S.C. 401(1) by permitting the agency "to sue and be sued" in its own name, "such language cannot * * * subject [the Postal Service] to liability under the antitrust laws as there was no attempt on the part of Congress to impose liability in the first place." App., *infra*, 24a (internal quotation marks omitted).

2. The United States Court of Appeals for the Ninth Circuit reversed, in relevant part, holding that the Postal Service is a "person" subject to suit under the



federal antitrust laws. App., *infra*, 1a-22a. The court of appeals acknowledged (*id.* at 4a) that the issue of a federal agency's amenability to suit is governed by this Court's two-step inquiry set forth in *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994), under which a court must determine, first, whether Congress has waived the agency's sovereign immunity and, second, whether "the source of substantive law upon which the claimant relies provides an avenue for relief" against the federal government.

Under *Meyer*'s first step, the court of appeals held that Congress waived the Postal Service's sovereign immunity by providing in 39 U.S.C. 401(1) that "[t]he Postal Service shall have the . . . power[] to sue and be sued in its official name." App., *infra*, 4a (brackets in original). In considering the second question, whether the antitrust laws provide a cause of action against the Postal Service, the court of appeals rejected the Postal Service's reliance on precedent (*e.g.*, *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941); *Sea-Land Serv., Inc.* v. *Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982)) holding that the United States and its instrumentalities are not "persons" subject to suit under the antitrust laws. The court reasoned that, "[a]lthough a federal sovereign is not a 'person,' the Postal Service is not a sovereign" because "the Postal Service does not enjoy sovereign immunity." App., *infra*, 8a. The court accordingly concluded that "[t]he Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation." *Id.* at 10a. The court stated, however, that the Postal Service may assert "conduct-based" immunity against antitrust liability "if the action of the Postal Service

being challenged was taken at the command of Congress." *Id.* at 13a.[1]

On November 4, 2002, the court of appeals denied the government's petition for rehearing and rehearing en banc. App., *infra*, 28a-29a.

**REASONS FOR GRANTING THE PETITION**

Since the founding of this Nation, postal service operations have constituted an essential "sovereign function." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981). Congress carried forward that tradition in the Postal Reorganization Act of 1970 by creating the Postal Serice as "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Notwithstanding the Postal Service's manifestly governmental character, the court of appeals held that the Postal Service is "not a sovereign" and, therefore, is a "person" subject to suit under the federal antitrust laws. App., *infra*, 8a.

The court of appeals' decision conflicts with the decision of this Court in *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), that the United States is not a "person" under the antitrust laws. The decision conflicts as well with the decisions of the courts of appeals that

[1] The court of appeals also reinstated the plaintiffs' claim under 28 U.S.C. 1491(b)(1) alleging violations of the Postal Service's Procurement Manual, and affirmed the district court's dismissal of the remaining claims. App., *infra*, 13a-22a. On the procurement claim, the court held, following the Federal Circuit's decision in *Emery Worldwide Airlines, Inc.* v. *United States*, 264 F.3d 1071, 1080-1081 (2001), that the Postal Service is a "federal agency" within the meaning of 28 U.S.C. 1491(b)(1), which provides for jurisdiction in the Court of Federal Claims (and in the district court in this case) over suits challenging contract actions in violation of procurement laws or regulations. See App., *infra*, 15a.



have held that federal instrumentalities likewise are not "persons" subject to antitrust liability.

The court of appeals' decision also conflicts with the Court's ruling in *FDIC* v. *Meyer*, 510 U.S. 471 (1994), that Congress's waiver of sovereign immunity with respect to a federal entity does not create a substantive cause of action against the entity. The court of appeals' decision similarly conflicts with the decisions of other courts of appeals that have specifically held that Congress's waiver of the Postal Service's sovereign immunity does not create liability against the Postal Service.

The court of appeals' decision exposes the Postal Service to significant and unwarranted litigation costs under the antitrust laws, which include treble damages and attorneys' fees. That result could undermine the ability of the Postal Service to carry out its legislative mandate to provide universal mail service at reasonable rates. This Court's review is accordingly warranted.

**A. The Court Of Appeals' Decision Conflicts With *United States* v. *Cooper* And Appellate Decisions Holding That The United States And Its Agencies And Instrumentalities Are Not "Persons" Subject To Suit Under the Antitrust Laws**

1. This Court in *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-606 (1941), held that Congress did not intend the statutory term "person" as used in the antitrust laws to include the United States. The Court therefore rejected the federal government's contention that the United States is a "person" authorized to sue for treble damages under the Sherman Act. The Court reasoned that, if the United States were a "person" entitled to sue, the United States would likewise be a "person" subject to liability under the Sherman Act, since the term has the same meaning when used

throughout the Act. *Id.* at 604-610. Concluding that the United States is not a "person" in either instance, the Court explained that, "[w]ithout going beyond the words of the section," "the phrase 'any person' is insufficient" to encompass the United States. *Id.* at 606.

Just as Congress did not intend the United States to be a "person" under the antitrust laws, Congress did not intend an agency or instrumentality of the United States to be a "person" under those laws. This Court repeatedly has held that Congress's intent to exclude the sovereign from the statutory term "person" equally excludes agencies and instrumentalities of the sovereign. The Court thus has concluded that state agencies are not persons liable under the False Claims Act, 31 U.S.C. 3729 (*Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 778-788 (2000)); that federal agencies were not persons under the removal provisions of 28 U.S.C. 1442(a)(1) (1988) (*International Primate Prot. League* v. *Tulane Educ. Fund*, 500 U.S. 72, 82-83 (1991)); that state agencies are not persons liable under 42 U.S.C. 1983 (*Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989)); and that federal instrumentalities are not "persons" under the Clean Water Act, 33 U.S.C. 1362(5) (*EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 222 n.37 (1976)). Where Congress has intended a contrary conclusion, it has expressly so provided. See, *e.g.*, 15 U.S.C. 1127 (defining "person" amenable to suit under the Lanham Act to include "the United States [or] any agency or instrumentality thereof").[2]

[2] Similarly, governmental agencies and instrumentalities equally share in the immunity of the sovereign. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); see *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 (1997) ("It has long been settled that the reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities.").



The exclusion of the United States from the term "person" in federal statutes applies with equal force to United States agencies and instrumentalities such as the Postal Service. The Postal Service is a quintessential agency or instrumentality of the United States. This country, like foreign nations, has from the beginning treated postal services as "a sovereign function" and "a sovereign necessity." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 121. The Continental Congress in 1775 appointed Benjamin Franklin as Postmaster General responsible for the delivery of mail. *Ibid.* And exercising its constitutional authority "[t]o establish Post Offices and Post Roads," U.S. Const. Art. I, § 8, Cl. 7, the First Congress in 1789 created the Office of the Postmaster General to oversee federal postal operations. Act of Sept. 22, 1789, ch. 16, 1 Stat. 70. Congress later granted the Postal Service exclusive rights to transmit letters, packages, and "other mailable matter," Act of Mar. 3, 1845, ch. 43, § 10, 5 Stat. 736, and formally established the Post Office Department as a department of the Executive Branch. Act of June 8, 1872, ch. 335, 17 Stat. 283.

Under the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, Congress transferred the responsibilities of the Post Office Department to the Postal Service. Congress did not establish the Postal Service as a corporation with a corporate charter or equity ownership interests. Thus, contrary to the court of appeals' belief (App, *infra*, 11a), Congress made no

change in 1970 that would bring the Postal Service within the definition of "person" in 15 U.S.C. 7 which includes "corporations" organized under the laws of the United States or a State or territory. Rather, Congress created the Postal Service as "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. Indeed, Congress expressly stated that "a basic and fundamental service" would thereby be "provided to the people *by the Government of the United States* * * * to bind the Nation together through the personal, educational, literary, and business correspondence of the people." 39 U.S.C. 101(a) (emphasis added).

The Postal Service is run by a Board of Governors whose eleven members are "officer[s] of the Government." 39 U.S.C. 202, 205(d). The President appoints, subject to Senate confirmation, nine of the eleven members, who in turn select the remaining two members, the Postmaster General and the Deputy Postmaster General. 39 U.S.C. 202(a), (c) and (d). Postal Service employees are federal employees who must take a public oath of office, 39 U.S.C. 410, 1001, 1011, and all liabilities incurred by the Postal Service, such as litigation judgments and settlements, are ultimately financed by the public fisc, 39 U.S.C. 2001, 2003, 2008(c). The Postal Service has uniquely federal sovereign powers, including the authority "to exercise, in the name of the United States, the right of eminent domain" (39 U.S.C. 401(9)); to negotiate international postal treaties and conventions (39 U.S.C. 407); to borrow on the United States' "full faith and credit" (39 U.S.C. 2006(c)(1)); and "to investigate postal offenses and civil matters relating to the Postal Service" (39 U.S.C. 404(7)). Congress has also given the Postal Service exclusive rights over the carriage of letters to



and from the United States. *Air Courier Conf.* v. *American Postal Workers Union*, 498 U.S. 517, 519 (1991) (citing 39 U.S.C. 601-606 and 18 U.S.C. 1693-1699). Because these various provisions of the Postal Reorganization Act make clear that the Postal Service is an agency or instrumentality of the United States, it is not subject to suit under the antitrust laws.

2. The court of appeals' treatment of the Postal Service as a "person" under the antitrust laws conflicts with the consistent view of other courts of appeals that have concluded that Congress's exclusion of the United States from the term "person" applies with equal force to its agencies and instrumentalities. In the first appellate decision to address the issue, *Sea-Land Serv. Inc.* v. *Alaska R.R.*, 659 F.2d 243, 245 (1981), cert. denied, 455 U.S. 919 (1982), the D.C. Circuit, in an opinion authored by then-Judge Ginsburg, held that the Sherman Act "does not expose United States instrumentalities to liability * * * for conduct alleged to violate antitrust constraints."

As the D.C. Circuit explained (659 F.2d at 245), Congress responded to the Court's decision in *Cooper*, *supra*, by amending the Clayton Act, Pub. L. No. 84-137, 69 Stat. 282, to authorize the United States to bring an action for actual, but not treble, damages. 15 U.S.C. 15a (Supp. III 1956). "Given the discrete consideration Congress gave to the situation of the United States, after the decision in *Cooper Corp.*, as a Sherman Act damage action plaintiff, and the legislature's total silence on the situation of the United States as a Sherman Act defendant," the D.C. Circuit declined to impose liability against the United States when Congress itself "failed to do" so. *Sea-Land*, 659 F.2d at 246. The court of appeals therefore concluded that the antitrust laws did not reach the Alaska Railroad and its

supervising United States agencies, even though such entities may "operat[e] alongside private companies" and provide goods and services similar to those available in the marketplace. *Id.* at 247.

The other courts of appeals that have considered the issue have followed the *Sea-Land* decision and have likewise held that federal agencies and instrumentalities are not amenable to suit under the antitrust laws. Thus, the Sixth Circuit in *Jet Courier Services, Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221, 1228 (1983), held that the Federal Reserve Banks are not persons under the Sherman Act. The Sixth Circuit explained that "[a]s an agency of the federal government the Federal Reserve System may not be sued under the Sherman Act." *Id.* at 1228 (citing *Sea-Land*, *supra*). The Second Circuit in *Name.Space, Inc.* v. *Network Solutions, Inc.*, 202 F.3d 573, 580-581 (2000), also followed *Sea-Land* and concluded that the National Science Foundation is not subject to the antitrust laws. The court explained that "the scope of the immunity conferred as a result of being a federal instrumentality is paradigmatically equivalent to that enjoyed by the United States itself, and therefore absolute." *Id.* at 581.

The Fourth Circuit in *Rex Systems, Inc.* v. *Holiday*, 814 F.2d 994, 995-997 (1987), similarly found "the *Sea-Land* court's holding to be persuasive" and held that the Department of the Navy is not a person under the Sherman Act. Likewise, the Fifth Circuit in *Greenwood Utility Commission* v. *Mississippi Power Co.*, 751 F.2d 1484, 1504 (1985), relied on the *Sea-Land* decision and held that the Southeastern Power Administration is, "of course, not subject to the antitrust laws." Finally, the Seventh Circuit concluded that the Army and Air Force Exchange Service "is a governmental instrumentality" and therefore not subject to suit under the Clayton Act.



*Champaign-Urbana News Agency, Inc.* v. *J.L. Cummins News Co.*, 632 F.2d 680, 689, 692 (1980).[3]

Thus, in ruling that an agency or instrumentality of the United States is subject to suit under the antitrust laws, the court of appeals has departed from the uniform course of lower court decisions.

3. The court of appeals attempted to distinguish *Sea-Land* and later decisions because the court of appeals viewed those decisions to "require (or assume) that the federal instrumentality at issue enjoys sovereign immunity." App., *infra*, 10a. That is not correct. *Sea-Land* did not turn on the presence or absence of sovereign immunity from suit generally. Indeed, the D.C. Circuit explicitly recognized that Section 702 of the Administrative Procedure Act, 5 U.S.C. 702, had "eliminate[d] the defense of sovereign immunity for actions in specific, nonmonetary relief." 659 F.2d at 244-245. The court of appeals accordingly observed that, "[w]ere sovereign immunity our sole concern, * * * we would hold the named United States agencies and officials answerable in this action." *Id.* at 244. The court nonetheless held that the substantive provisions of the Sherman Act do not reach "United States instrumentalities." *Id.* at 245.

Similarly, the Sixth Circuit's decision in *Jet Courier* held that the antitrust laws do not apply to a Federal Reserve Bank, which may "sue and be sued" under 12 U.S.C. 341. Although the decision in *Jet Courier* did

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[3] The court of appeals itself had previously stated that the assertion of antitrust liability against a federal agency was "frivolous." *Department of Water & Power* v. *Bonneville Power Admin.*, 759 F.2d 684, 693 n.12 (1985); see *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286, 1288 (1985) (holding that the Guam Airport Authority is not a person subject to antitrust liability), cert. denied, 475 U.S. 1081 (1986).

not discuss Congress's waiver of the Federal Reserve Bank's sovereign immunity in 12 U.S.C. 341, the court of appeals' holding in this case that the Postal Service is a person subject to antitrust liability by virtue of a "sue-and-be-sued" clause is fundamentally inconsistent with the result reached by the Sixth Circuit in *Jet Courier*.[4]

**B. The Court Of Appeals' Decision Conflicts With *FDIC* v. *Meyer* And Other Appellate Decisions Holding That Congress's Waiver Of A Federal Agency's Sovereign Immunity From Suit Does Not Create A Cause Of Action Against The Agency**

1. In holding that a cause of action under the antitrust laws may be maintained against the Postal Service, the court of appeals relied solely on the fact that Congress has waived the Postal Service's sovereign immunity by permitting it "to sue and be sued"

[4] Congress in similar terms has waived the government's sovereign immunity with respect to numerous other federal entities. 7 U.S.C. 942 (Rural Telephone Bank); 7 U.S.C. 1506 (Federal Crop Insurance Corporation); 12 U.S.C. 635(a)(1) (Export-Import Bank of the United States); 12 U.S.C. 1441a(a)(5)(J) (Thrift Depositor Protection Oversight Board); 12 U.S.C. 1441a(b)(9)(E) (Resolution Trust Corporation); 12 U.S.C. 1789(a)(2) (National Credit Union Administration); 12 U.S.C. 1819 (Federal Deposit Insurance Corporation); 12 U.S.C. 2013(4) (Farm Credit Banks); 12 U.S.C. 2073(4) (Production Credit Associations); 12 U.S.C. 2093 (Federal Land Bank Associations); 12 U.S.C. 2278a-3 (Farm Credit System Assistance Board); 12 U.S.C. 2278b-4 (Farm Credit System Financial Assistance Corporation); 12 U.S.C. 2279aa-3 (Federal Agricultural Mortgage Corporation); 12 U.S.C. 2289(1) (Federal Financing Bank); 15 U.S.C. 634(b)(1) (Small Business Administration); 15 U.S.C. 714b (Commodity Credit Corporation); 22 U.S.C. 290f (Inter-American Foundation); 22 U.S.C. 2199(d) (Overseas Private Investment Corporation); 29 U.S.C. 1302(b)(1) (Pension Benefit Guaranty Corporation).



under 39 U.S.C. 401(1). The court of appeals concluded that such a waiver of sovereign immunity deprives the Postal Service of its status as a governmental entity. App., *infra*, 4a ("[T]he Postal Service lost its sovereign status pursuant to the Postal Reorganization Act of 1970 * * * which provides in relevant part that 'The Postal Service shall have the . . . power [] to sue and be sued."); *id.* at 8a ("Although a federal sovereign is not a 'person,' the Postal Service is not a sovereign."); *id.* at 10a ("Here, the Postal Service does not enjoy federal sovereignty."); *ibid.* ("The Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn."); *id.* at 13a ("Congress has stripped the Postal Service of its sovereign status by launching it into the commercial world as a sue-and-be-sued entity akin to a private corporation.").

The court of appeals' decision that a statutory waiver of sovereign immunity in a "sue and be sued" clause exposes the Postal Service to a cause of action under the antitrust laws squarely conflicts with the Court's decision in *FDIC* v. *Meyer*, 510 U.S. 471 (1994). The Court in *Meyer* held that, although Congress waived the sovereign immunity of the FSLIC with a "sue-and-be-sued" clause (12 U.S.C. 1725(c)(4) (1988)), there nonetheless is no cause of action under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), against federal instrumentalities. The Court in *Meyer* thus held that the court of appeals had erred in determining that "Meyer had a cause of action for damages against FSLIC *because* there had been a waiver of sovereign immunity." 510 U.S. at 483-484. The court explained that such "reasoning conflates" the question whether there is a waiver of a sovereign immunity with the "analytically distinct" question whether Congress

intended to create a cause of action. *Id.* at 484. The Court held that notwithstanding a waiver of sovereign immunity, a court must independently find that "the source of substantive law upon which the claimant relies provides an avenue for relief" against the government and its agencies. *Ibid.*

The court of appeals seriously erred in holding that, because Congress waived the Postal Service's sovereign immunity to suit, Congress intended to subject the Postal Service to the antitrust laws. Indeed, Congress's waiver of the Postal Service's *sovereign immunity* necessarily presupposes that the Postal Service is a sovereign arm of the United States Government and, as such, is not a "person" subject to suit under the antitrust laws.

2. a. For similar reasons, the court of appeals erred in relying (App., *infra*, 4a-6a, 8a, 10a) on this Court's decisions in *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512 (1984), and *Loeffler* v. *Frank*, 486 U.S. 549 (1988), as a basis for imposing substantive liability under the antitrust laws on the Postal Service. Those decisions did not work a radical change in the Court's jurisprudence, as the court of appeals seemed to believe. In *Franchise Tax Board*, the Court simply held that a "sue-and-be-sued" clause —which the Court had previously held in *FHA* v. *Burr*, 309 U.S. 242 (1940), subjects the federal agency concerned to garnishment orders issued by a state court— also applies to garnishment orders issued by a state administrative agency. In so ruling, the Court noted that the Postal Service was simply a stakeholder of the employee's wages that were the subject of the garnishment order. 467 U.S. at 520. In *Loeffler*, the Court simply applied to suits against the Postal Service under Title VII of the Civil Rights Act of 1964, 42 U.S.C.



2000e *et seq.*, the already-settled rule (see 486 U.S. at 555) that the waiver of sovereign immunity in a "sue-and-be-sued" clause operates to waive the otherwise applicable rule of immunity of the federal government to an award of prejudgment interest.

Neither *Franchise Tax Board* nor *Loeffler* suggested that the "sue-and-be-sued" clause in Section 401(1) constitutes anything more than a waiver of sovereign immunity, or that such a clause is sufficient in itself to subject the Postal Service (or any other federal agency or instrumentality whose organic statute contains a similar clause) to new sources of liability under substantive law, such as the antitrust laws. 39 U.S.C. 401(1). Indeed, the Court in *Loeffler* explicitly recognized that the source of the Postal Service's liability under Title VII derives not from its "sue-and-be-sued" clause and the provisions of Title VII that apply to private parties, but rather from the separate and express provision under Section 717 of Title VII, 42 U.S.C. 2000e-16, provides for a cause of action against federal entities. 486 U.S. at 563. And the Court's subsequent decision in *Meyer*, 510 U.S. at 484, makes abundantly clear that Congress's waiver of sovereign immunity does not by its own force create a cause of action against federal entities.

b. The court of appeals' holding that the "sue-and-be-sued" clause in 39 U.S.C. 401(1) creates an antitrust cause of action against the Postal Service conflicts with decisions of the courts of appeals that have held— subsequent to *Franchise Tax Board* and *Loeffler*—that the "sue-and-be-sued" clause does *not* provide an independent source of liability against the Postal Service.

The Sixth Circuit in *Robinson* v. *Runyon*, 149 F.3d 507 (1998), and the Seventh Circuit in *Baker* v. *Runyon*, 114 F.3d 668 (1997), cert. denied, 525 U.S. 929 (1998),

have held that Congress's waiver of sovereign immunity in 39 U.S.C. 401(1) does not render the Postal Service liable for punitive damages under Title VII because such awards are not applicable to any "government [or] government agency" (see 42 U.S.C. 1981a(b)(1)). The Sixth Circuit in *Robinson* noted that although the Postal Service is a "commercial like" operation, "it functions as part of the federal government," exercises "uniquely governmental powers such as the authority to borrow money backed by the full faith and credit of the United States Government, the right of eminent domain, and the right to negotiate international postal treaties and conventions," and "shall be operated as a basic and fundamental service provided to the people *by the Government of the United States.*" 149 F.3d at 516 (citations omitted) (quoting 39 U.S.C. 101(a)). The court therefore concluded that, notwithstanding the waiver of sovereign immunity in the "sue-or-be-sued" clause, there is no "substantive law" that provides for punitive damages against government agencies. *Id.* at 517 (citing *FDIC* v. *Meyer*, 510 U.S. at 484). The court reasoned:

> [S]imply because Congress has provided that an entity may generally be sued for damages does not equate with the presumption that the particular law under which a plaintiff brings suit will permit such damages awards. * * * The mere fact that Congress even had to explicitly waive the sovereign immunity of the Postal Service in the first place indicates that Congress considered the Postal Service a federal agency, or otherwise such a waiver would be unnecessary.

*Ibid.* The Seventh Circuit in *Baker* similarly employed the two-step inquiry under *Meyer* and concluded that



Congress's waiver of sovereign immunity does not render the Postal Service liable for punitive damages under Title VII. 114 F.3d at 670-671.

In an analogous context, the Second Circuit in *In re Young*, 869 F.2d 158, 159 (1989) (per curiam), held that Congress's waiver of sovereign immunity in 39 U.S.C. 401(1) does not subject the Postal Service to trial by jury because 28 U.S.C. 2402 prohibits trial by jury against "the United States." The court of appeals explained that "the waiver of sovereign immunity does not, by itself, grant a right to trial by jury in an action against the federal government." 869 F.2d at 159. The court accordingly concluded that "the waiver does not change the fact that the party being sued is still the federal government." *Ibid.*

The decisions in *Robinson*, *Baker*, and *Young*, each hold that the Postal Service's amenability to suit under 39 U.S.C. 401(1) does not deprive the Postal Service of its governmental character and independently create a substantive right against the Postal Service. Those decisions cannot be reconciled with the court of appeals' holding below that the Postal Service is subject to suit under the antitrust laws solely by virtue of Congress's waiver of sovereign immunity in 39 U.S.C. 401(1).

### C. The Court Of Appeals' Decision Threatens To Impose Unwarranted Costs And Liabilities On The Postal Service

1. This Court's review is warranted not only because the court of appeals' decision conflicts with decisions of this Court and other courts of appeals, but also because it seriously threatens to interfere with the operations of the Postal Service. Congress has directed that the Postal Service "shall provide adequate and efficient postal services at fair and reasonable rates and fees"

and "shall serve as nearly as practicable the entire population of the United States." 39 U.S.C. 403. The Postal Service also must operate "so that the total estimated income and appropriations * * * will equal as nearly as practicable total estimated costs." 39 U.S.C. 3621. Subjecting the Postal Service to the antitrust laws, whose sanctions include treble damages and attorney's fees (15 U.S.C. 15(a)), could significantly impair the Postal Service's ability to carry out its legislative mandate to deliver universal mail service to the entire nation under a break-even requirement.[5]

The breadth and variety of the Postal Service's operations present an immediate likelihood of substantial litigation costs and potential liabilities. The Postal Service exercises exclusive distribution rights over the carriage of letters to and from the United States, *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. at 519, and the Postal Service provides express-mail, parcel, overseas, and other delivery services by competing with private businesses. United States Postal Service, *2002 Annual Report* 52-53 (*2002 Annual Report*). The Postal Service employs 770,000 workers to deliver 200 billion pieces of mail each year (40% of the world's mail), and is the eleventh largest enterprise in the Nation based on its $66 billion in annual revenues. United States Postal Service, *Transformation Plan* i (Apr. 2002) (*2002 Transformation Plan*).

Application of the antitrust laws could impose significant expenses and delay on Postal Service operations that would inevitably flow from having to defend against antitrust claims. In light of economic uncer-

[5] Indeed, the antitrust laws provide for criminal penalties in certain circumstances. See 15 U.S.C. 1, 2, 13a.



tainties, increased security needs, and advances in communications technology that reduce the volume of mail, *2002 Annual Report* 16; *2002 Transformation Plan* i, 1-3, the Postal Service cannot readily afford increased costs that Congress neither intended nor anticipated. Indeed, the burdens associated with litigation costs, settlements, or judgments will be borne by American citizens, either through higher service fees or larger budgetary appropriations. 39 U.S.C. 2001, 2003, 2008(c).

2. Nor is the need for this Court's review diminished by the court of appeals' statement that, although the Postal Service is subject to suit under the antitrust laws, it would recognize an exception from liability if the "action being challenged by the Postal Service was taken at the command of Congress." App., *infra*, 13a. The court of appeals' decision would force the Postal Service to undergo potentially extensive and costly litigation to determine the precise contours of such an exception and whether a court will deem it to apply in a given case. Because Congress never intended to subject the Postal Service to suit under the antitrust laws in the first place, there is no basis for imposing those costs and burdens on the Postal Service.

That conclusion holds true regardless of how the court of appeals envisioned that such an exception might apply. Indeed, the exception would be largely meaningless if the Postal Service had to prove that Congress "command[ed]" the particular challenged action at issue, because Congress commands relatively few of the Postal Service's commercial activities. The salient fact is that the Postal Service is a federal agency or instrumentality and is authorized to take all actions "incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers."

39 U.S.C. 401(10). At a minimum, the court of appeals' decision would create an entirely unnecessary and cumbersome regime by requiring the Postal Service to prove, on a case-by-case basis, that the challenged action was taken pursuant to a sufficient congressional mandate. Cf. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 39 (1985) (municipal action not shielded from antitrust laws unless municipality establishes that it was taken pursuant to a "clearly articulate and affirmatively expressed . . . state policy") (citation omitted). Because such a regime would itself impose litigation costs and burdens that Congress never intended, this Court's review is warranted.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*
ROBERT D. MCCALLUM, JR.
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
LISA S. BLATT
*Assistant to the Solicitor General*
MARK B. STERN
R. CRAIG GREEN
*Attorneys*

MARCH 2003

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 01-15963

FLAMINGO INDUSTRIES (USA) LTD. AND ARTHUR WAH, PLAINTIFFS-APPELLANTS

*v.*

UNITED STATES POSTAL SERVICE, AN ENTITY CREATED PURSUANT TO THE POSTAL REORGANIZATION ACT, DEFENDANT-APPELLEE

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Filed Aug. 23, 2002

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**OPINION**

Before: LAY,* THOMPSON, and TALLMAN, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge.

Plaintiffs Flamingo Industries and its owner Arthur Wah (collectively "Flamingo") brought suit in the Northern District of California against the United States Postal Service. Flamingo asserted a number of federal and state law claims stemming from the Postal Service's termination of Flamingo's contract to produce U.S. Mail sacks. The district court dismissed the suit for lack of jurisdiction and improper venue, and did not

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

reach the merits of any of the claims. Flamingo appeals.

According to the allegations of Flamingo's complaint, which we take as true for purposes of this appeal, the Postal Service terminated Flamingo's contract because it wanted to use cheaper mail sacks manufactured in Mexico, sacks that fail to meet safety and quality regulations. To disguise this scheme, the Postal Service adopted outdated requirements for mail sacks that could not be met by the modern machines used by Flamingo and other domestic manufactures, creating a pretext for canceling the domestic mail sack contracts. Once those contracts were canceled, the Service declared a fake emergency in the supply of mail sacks that allowed it to award future contracts to foreign manufactures on a no-bid basis. The Service sought to hide the false nature of this emergency by failing to follow regulations requiring documentation of any emergency.

Based on this alleged conduct, Flamingo asserted five federal antitrust claims, alleging that the Postal Service, in collusion with Mexican mail sack manufacturers, sought to suppress competition and create a monopoly in mail sack production in violation of federal antitrust laws. Flamingo also asserted claims alleging that the Postal Service violated the Postal Service Procurement Manual, the implied covenant of good faith and fair dealing, California Business and Professions Code § 17200, and 42 U.S.C. § 1983.

The district court did not reach the merits of any of these claims. It dismissed the federal antitrust claims on the ground that the Postal Service was protected by sovereign immunity from antitrust liability. It determined that the claim for breach of the implied covenant of good faith and fair dealing was a tort claim, and dismissed it for lack of exhaustion under the Federal Tort Claims Act. The court dismissed the remaining claims on the ground that venue did not lie in the Northern District of California.



We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for further proceedings. We conclude that: (1) Flamingo may pursue claims against the Postal Service for alleged violations of federal antitrust laws because Congress has withdrawn the cloak of sovereign immunity from the Postal Service and given it the status of a private corporation; (2) the district court had jurisdiction over Flamingo's Procurement Manual claim pursuant to 28 U.S.C. § 1491(b); (3) the court properly dismissed Flamingo's breach of implied covenant claim for failure to exhaust under the Federal Tort Claims Act; (4) although the district court had original jurisdiction over Flamingo's claim asserted under California Business & Professions Code § 17200, that claim was properly dismissed because it is preempted by federal law; (5) Flamingo's 42 U.S.C. § 1983 claim fails to state a claim upon which relief can be granted; and (6) venue for the Postal Service Procurement Manual claim was properly laid in the Northern District of California.

## I

## THE FEDERAL ANTITRUST LAW CLAIMS

Flamingo argues the district court erred in holding that sovereign immunity bars its suit against the Postal Service under federal antitrust laws.[1] Flamingo con-

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[1] We do not distinguish between the various sections of the federal antitrust laws relied upon by Flamingo in its complaint—15 U.S.C. §§ 1, 13, 13a, 14, 45—because all of these sections are sub-

tends the Postal Service lost its sovereign status pursuant to the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified as amended in Title 39 of the United States Code), which provides in relevant part that "The Postal Service shall have the . . . power[] to sue and be sued in its official name." 39 U.S.C. § 401(1). We agree.

In *FDIC* v. *Meyer*, 510 U.S. 471, 484, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994), the Supreme Court applied a two-step inquiry in analyzing whether a federal instrumentality enjoys immunity from a particular substantive area of law. Under this analysis, "[t]he first inquiry is whether there has been a waiver of sovereign immunity." *Id.* If there has been, "the second inquiry . . . [is] whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Id.*

A

Following *Meyer*, we first consider whether 39 U.S.C. § 401(1) operates as a waiver of the Postal Service's sovereign immunity. More precisely, our inquiry is whether the sue-and-be-sued language of that section waives sovereign immunity as to the plaintiffs' antitrust claims.

The Supreme Court established the breadth of the Postal Service's sovereign immunity waiver in *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 104 S. Ct. 2549, 81 L. Ed. 2d 446 (1984). There, the issue was whether the Postal Service had to comply with a state tax board's liens on Postal Service employees' salaries. The Court began its analysis by

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ject to the same analysis as to the sovereign immunity issue presented.



recognizing that the general presumption is that a sue-and be-sued clause should be liberally construed: "[W]hen Congress establishes . . . an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." *Id.* at 517 (quoting *FHA* v. *Burr*, 309 U.S. 242, 245, 60 S. Ct. 488, 84 L. Ed. 724 (1940)). To overcome this presumption "it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Id.* at 517-18 (quoting *Burr*, 309 U.S. at 245).

The Postal Service could not overcome the presumption. In doing away with the Post Office Department and creating the Postal Service in the Postal Reorganization Act, Congress had "indicated that it wished the Postal Service to be run more like a business than had its predecessor . . . ." *Id.* at 519-20. Congress had "'launched [the Postal Service] into the commercial world'; hence under *Burr* not only must we liberally construe the sue-and-be-sued clause, but also we must presume that the Service's liability is the same as that of any other business." *Id.* at 520 (brackets in original).

The Court reaffirmed the breadth of the Postal Service's waiver in *Loeffler* v. *Frank*, 486 U.S. 549, 108 S. Ct. 1965, 100 L. Ed. 2d 549 (1988). There, a mail carrier had successfully maintained a Title VII action against the Postal Service and was seeking prejudgment interest on his award of damages. *Id.* at 552.

Title VII allowed for actions against the federal government, *see* 42 U.S.C. § 2000e-16, but it did not contain a provision allowing for prejudgment interest against the government. Indeed, just two years earlier, in *Library of Congress* v. *Shaw*, 478 U.S. 310, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986), the Supreme Court had held that sovereign immunity barred the payment of interest on an award under Title VII against the Library of Congress. The Court in *Loeffler*, however, distinguished *Shaw* because, unlike the Library of Congress, the Postal Service's sovereign immunity had been waived. *Loeffler*, 486 U.S. at 554-56, 565.

The Court stressed the difference between a sovereign instrumentality, such as the Library of Congress, and a non-sovereign sue-and-be-sued instrumentality, such as the Postal Service. The Court stated that in *Shaw*, "the starting point for our analysis was the 'no-interest rule,' which is to the effect that, absent express consent by Congress, the United States is immune from interest awards . . . . The dispositive question was . . . whether Title VII contained an express waiver of the Library of Congress' immunity from interest." *Loeffler*, 486 U.S. at 565 (citation omitted). It did not. However, "'[t]he no-interest rule is . . . inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise.'" *Id.* (quoting *Shaw*, 478 U.S. at 317 n.5). "In creating the Postal Service, Congress [cast off the cloak of sovereignty], and therefore, the no-interest rule does not apply to it." *Id.*

In 1994, the Court returned to the sue-and-be-sued issue in *Meyer*, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed.2d 308. There, the plaintiff prevailed at trial in a



*Bivens*[2] action against the Federal Savings and Loan Insurance Corporation (FSLIC), which was a federal sue-and-be-sued instrumentality. After the FDIC, the successor in interest to the FSLIC, appealed unsuccessfully, the Supreme Court granted certiorari. *Id.* at 473-75. In rejecting the FDIC's argument that the FSLIC enjoyed sovereign immunity, the Court reiterated that "sue-and-be-sued waivers are to be 'liberally' construed . . . notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign." *Id.* at 480 (citation omitted). Further, the fact that *Bivens* actions were not generally available against private corporations was not controlling. "[W]e [have] looked to the liability of a private enterprise as a floor below which [a sue-and-be-sued] agency's liability could not fall," not a ceiling that may not be exceeded. *Id.* at 482-83 (emphasis omitted). Thus, the waiver of the FSLIC's immunity included federal constitutional torts. *Id.* at 483. The Court went on to hold, however, that *Bivens* actions could not be filed against federal agencies, only against federal officers. *Id.* at 484-86.

Relying on *Franchise Tax Board*, *Loeffler*, and *Meyer*, Flamingo argues that the Postal Service's waiver of immunity reaches federal antitrust actions. We agree. In *Franchise Tax Board*, the Court held that the general liberal-construction rule can be overcome only if the Postal Service makes a clear showing that the type of suit filed against it is not consistent with the statutory or constitutional scheme, an implied restriction is necessary to avoid "grave interference

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[2] *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (recognizing an implied cause of action against federal officials who violate the Constitution).

with the performance of a governmental function," or Congress plainly intended to use "sue and be sued" in a narrow sense. *Franchise Tax Bd.*, 467 U.S. at 517-18 (quoting *Burr*, 309 U.S. at 245); *accord Loeffler*, 486 U.S. at 554-55. Here, the Postal Service does not "attempt to make the 'clear' showing of congressional purpose necessary to overcome the presumption that immunity [from federal antitrust actions] has been waived." *Meyer*, 510 U.S. at 481. Further, it is doubtful the Postal Service could make that showing: As was the case in *Loeffler*, "since Congress expressly included several narrow and specific limitations on the operation of the [Postal Service's] sue-and-be-sued clause, *see* 39 U.S.C. § 409, none of which is applicable here, the natural inference is that it did not intend other limitations to be implied." *Loeffler*, 486 U.S. at 557 (footnote omitted).

B

Having determined that Congress has waived the Postal Service's immunity, we turn to the second inquiry, "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Meyer*, 510 U.S. at 484. The source of substantive law upon which Flamingo relies is federal antitrust law. The Postal Service argues that a federal antitrust claim may not be pursued against it because it is not a "person" within the meaning of that law. We disagree. Although a federal sovereign is not a "person," the Postal Service is not a sovereign.

The rule that the federal government and its instrumentalities are not "persons" for federal antitrust law purposes dates back to *United States* v. *Cooper Corp.*, 312 U.S. 600, 61 S. Ct. 742, 85 L.Ed. 1071 (1941). In *Cooper*, the federal government attempted to bring a



civil suit under the Sherman Act. The Court rejected the suit, holding that the Sherman Act only allowed "persons" to bring civil suits and the United States did not meet the definition of a "person" under the Act. *Id.* at 604, 614. The Court explained that, "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *Id.* at 604. Although "there is no hard and fast rule of exclusion" of the sovereign from the word "person," *id.* at 604-05, the Court was concerned because the Sherman Act used the word "person" to describe both who could bring suit and who could be sued. The Court wanted to avoid interpreting "person" in a manner in which the United States could be sued. *Id.* at 606. Hence, the Court reasoned that "[t]he more natural inference . . . is that the meaning of the word was in both uses limited to what are usually known as natural and artificial persons, that is, individuals and corporations." *Id.*

Later circuit court decisions extended *Cooper* to exclude federal instrumentalities from the meaning of the word "person" in federal antitrust laws. In the seminal case of *Sea-Land Service, Inc.* v. *Alaska Railroad*, 659 F.2d 243, 244 (D.C. Cir. 1981), then-Judge Ginsburg wrote for the court in holding that "Congress did not place the United States or its instrumentalities under the governance of the Sherman Act." The *Sea-Land Service* opinion relied on *Cooper*, and on Congress's decision after *Cooper* to amend some of the federal antitrust laws to allow the United States to bring civil actions for single, but not treble, damages. *Id.* at 245-46. This, the court reasoned, represented a Congressional intent to leave the word "persons" as the *Cooper* Court had defined it. *Id.* at 246.

In *Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288-89 (9th Cir. 1985), we applied *Sea-Land Service* and held that federal instrumentalities are immune from antitrust liability. Because the defendant government of Guam was "an instrumentality of the federal government," we held "[t]here is no reason why Guam should enjoy less immunity than the federal government itself." *Id.* at 1289 (citing *Jet Courier Servs., Inc.* v. *Fed. Reserve Bank of Atlanta*, 713 F.2d 1221, 1228 (6th Cir. 1983), and *Sea-Land Serv.*, 659 F.2d at 246-47).

*Cooper*, *Sea-Land Service*, and *Sakamoto* remain valid precedent, but they do not control our decision today. These holdings require (or assume) that the federal instrumentality at issue enjoys federal sovereignty. As the Second Circuit recently explained: "[W]hile the *Sea-Land* court's holding that the Sherman Act does not expose federal agencies to legal or equitable liability for alleged antitrust violations . . . is uncontroversial, such immunity was founded on the sovereign immunity of the United States." *Name.-Space, Inc.* v. *Network Solutions, Inc.*, 202 F.3d 573, 580-81 (2d Cir. 2000) (citation omitted). Here, the Postal Service does not enjoy federal sovereignty.

The Postal Service's sue-and-be-sued waiver of immunity has created a presumption that the cloak of sovereignty has been withdrawn and that the Postal Service should be treated as a private corporation. *See Franchise Tax Board*, 467 U.S. at 520 ("[W]e must presume that the Service's liability is the same as that of any other business."); *accord Loeffler*, 486 U.S. at 556 ("Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.'") (quoting *Shaw*, 478 U.S. at 317 n.5.); *see*



*also Meyer*, 510 U.S. at 482 (the Court has "looked to the liability of a private enterprise as a floor below which the [sue-and-be-sued] agency's liability could not fall."). Because the Postal Service is an entity with the status of a private commercial enterprise, it fits within the common meaning of the word "person," just as does any other private corporation. *See* 15 U.S.C. § 7 ("The word 'person,' or 'persons,' wherever used in [Title 15 of the United States Code] shall be deemed to include corporations . . . ."); *see also Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 782, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000) ("[T]he presumption with regard to corporations is just the opposite of the one governing [sovereigns]: they are presumptively covered by the term 'person' . . . .") (citing 1 U.S.C. § 1) (emphasis omitted).

We find support for our conclusion in *Global Mail Ltd.* v. *United States Postal Service*, 142 F.3d 208, 216-17 (4th Cir. 1998). There, the Fourth Circuit held that the Postal Service was a "person" that could be sued under the Lanham Act.[3] The court explained:

> [T]he Lanham Act itself contains no waiver of sovereign immunity for the federal government, and . . . the Act's definition of 'person' as an 'organization capable of being sued' falls short of the standard of explicitness required for such a waiver. But those agencies whose immunity has already been waived, and are capable of suing and being sued, fall squarely within the plain language of the Lanham

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[3] Since *Global Mail* was decided, the Lanham Act was amended to expressly cover the United States and its instrumentalities as "persons." *See* Pub.L. No. 106-43, §§ 4(c), 6(b), 113 Stat. 219, 220 (1999) (codified at 15 U.S.C. § 1127).

> Act's definition of 'juristic persons.' . . . [A] governmental agency engaged in a commercial enterprise, as is USPS, is indistinguishable in kind from a private 'firm' or 'association.'

*Id.* at 216;[4] *accord Fed. Express Corp.* v. *United States Postal Serv.*, 151 F.3d 536, 544-46 (6th Cir. 1998); *United States* v. *Q Int'l Courier, Inc.*, 131 F.3d 770, 775 (8th Cir. 1997). This reasoning applies equally here, where federal antitrust law defines "person" as including any private corporation, *see* 15 U.S.C. § 7, and where Supreme Court precedent establishes that the Postal Service is to be treated as a private corporation. *See Loeffler*, 486 U.S. at 556.

The Postal Service cites several cases involving sue-and-be-sued instrumentalities where such entities were held exempt from federal antitrust laws. *See Jet Courier Servs.*, 713 F.2d at 1228-29; *E.W. Wiggins Airways, Inc.* v. *Mass. Port Auth.*, 362 F.2d 52, 56 (1st Cir. 1966); *Webster County Coal Corp.* v. *Tenn. Valley Auth.*, 476 F. Supp. 529, 531-32 (W.D. Ky. 1979). These cases predate the Supreme Court's decisions in *Franchise Tax Board*, *Loeffler*, and *Meyer* and are not persuasive

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[4] The Postal Service points out that *Global Mail* holds that Lanham Act claims, which are federal tort claims, may be brought against the Postal Service. According to the Postal Service, this is contrary to the law of this circuit under *Pereira* v. *United States Postal Serv.*, 964 F.2d 873 (9th Cir. 1992). In *Pereira*, we held that the Postal Service is immune from suit for federal torts because the sue-and-be-sued clause is limited by the Federal Tort Claims Act (FTCA). *Id.* at 876-77. However, subsequent to *Pereira*, the Supreme Court held that the FTCA does not limit a sue-and-be-sued waiver as to federal tort claims because the FTCA only applies to state tort claims. *Meyer*, 510 U.S. at 476-79. This overruled *Pereira*.



authority in light of the Court's recent sue-and-be-sued jurisprudence.

We hold that the Postal Service can be sued under federal antitrust laws because Congress has stripped the Postal Service of its sovereign status by launching it into the commercial world as a sue-and-be-sued entity akin to a private corporation. However, we add one significant caveat. Two types of immunity from federal antitrust laws exist. Our discussion has focused solely on the first kind of immunity—"status-based" immunity, *see Name.Space*, 202 F.3d at 581—because the parties only raise that type of immunity. A second type of immunity—"conduct-based" immunity—can apply when an entity does not enjoy status-based immunity, but acts at the direction of a federal sovereign. *See id.* at 581-82 (holding that a nonsovereign contractor enjoyed immunity from antitrust law where it was exercising a Congressionally-mandated monopoly). Accordingly, our holding that the Postal Service does not enjoy status-based immunity does not prevent the Service from asserting conduct-based immunity if the action of the Postal Service being challenged was taken at the command of Congress. *See generally Air Courier Conf.* v. *Am. Postal Workers Union*, 498 U.S. 517, 519, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991) (recognizing that Congress has conferred a legal monopoly on the Postal Service over mail delivery in and from the United States).

## II

## THE PROCUREMENT MANUAL CLAIM

The Postal Service argues that the district court lacked jurisdiction over Flamingo's claim that it violated the Postal Service Procurement Manual because Flamingo lacks standing to assert the claim. The par-

ties' briefs devote much energy to an inconsistent series of cases from the 1970's to the 1990's discussing this issue. We need not attempt to reconcile these cases; they are irrelevant.

In 1996, Congress amended 28 U.S.C. § 1491, part of the codification of the Tucker Act, by enacting the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 104-320, 110 Stat. 3870 (1996). The relevant portion of the ADRA, as codified, reads:

> Both the Unite[d] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

28 U.S.C. § 1491(b)(1). A sunset provision in the ADRA terminated district court jurisdiction under § 1491(b)(1) on January 1, 2001; however, a savings provision states that the termination of jurisdiction "shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000." ADRA, Pub. L. 104-320, § 12(d)-(e). Flamingo is within this savings clause because it filed its action on July 11, 2000. This being so, the questions presented are whether § 1491(b)(1) applies to the Postal Service, and if so, whether Flamingo has



standing to assert the Procurement Manual claim. At our request, the parties addressed these questions at oral argument.

Having considered the parties' arguments, we hold that § 1491(b)(1) applies to the Postal Service. In *Emery Worldwide Airlines, Inc.* v. *United States*, 264 F.3d 1071, 1080-83 (Fed. Cir. 2001), the Federal Circuit held that the Postal Service could be sued under § 1491(b)(1). The court explained that, although Title 28 of the United States Code does not define "federal agency," it does define "agency" in a manner that covers the Postal Service. *Emery Worldwide Airlines*, 264 F.3d at 1080-81 (citing 28 U.S.C. § 451 and 39 U.S.C. § 201). We agree with the reasoning of *Emery Worldwide Airlines*, and follow its holding. [5]

We also hold that Flamingo has standing under § 1491(b)(1) to assert its Procurement Manual claim. Section 1491(b)(1) provides for district court jurisdiction over any claim by an "interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." Flamingo alleges that the Postal

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[5] 28 U.S.C. § 1491(b)(4) imports Administrative Procedures Act (APA) standards of review into procurement cases under 28 U.S.C. § 1491(b)(1). 39 U.S.C. § 410(a) exempts the Postal Service from most of the APA. In *Emery Worldwide Airlines*, the court noted the possibility that 28 U.S.C. § 1491(b)(4) and 39 U.S.C. § 410(a) are in conflict, although the court avoided deciding the issue. *See Emery Worldwide Airlines*, 264 F.3d at 1084-85. We do not see a conflict. 28 U.S.C. § 1491(b)(4) incorporates by reference the APA review standards into cases under 28 U.S.C. § 1491(b)(1); 28 U.S.C. § 1491(b)(4) does not create APA liability.

Service violated its Procurement Manual by maintaining contracts with Mexican suppliers of mail sacks that violated the Manual while unfairly canceling a procurement contract with Flamingo. Flamingo also alleges that the Postal Service violated the Manual by falsely declaring an emergency in the supply of mail sacks and failing to document this emergency so as to be able to award no-bid contracts to Mexican suppliers. Flamingo has standing under 28 U.S.C. § 1491(b)(1).

## III

## THE IMPLIED COVENANT CLAIM

The district court held that it lacked jurisdiction over Flamingo's claim for an alleged violation of the implied covenant of good faith and fair dealing because that claim was an unexhausted tort claim barred under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. The FTCA applies to the Postal Service, *see* 39 U.S.C. § 409(c), and Flamingo has never disputed that the claim is a tort claim covered by the FTCA. Under the FTCA, the claim had to be administratively exhausted for the court to have subject matter jurisdiction. *Jerves* v. *United States*, 966 F.2d 517, 518-19 (9th Cir. 1992); *see* 28 U.S.C. § 2675(a).

In determining that the claim was unexhausted, the district court considered a declaration submitted by the Postal Service and took note of Flamingo's failure to proffer contrary evidence. We therefore treat the court's dismissal of the claim as a grant of summary judgment, which we review de novo. *Lopez* v. *Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

The declaration submitted to the district court by the Postal Service demonstrated that Flamingo had not met the exhaustion requirement of the FTCA. Flamingo failed to present any evidence contradicting this declaration. We affirm the district court's dismissal of the claim.



## IV

## THE CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200 CLAIM

The Postal Service argues that the district court lacked supplemental jurisdiction over the California Business & Professions Code § 17200 claim and, alternatively, that the claim is preempted by federal law. We do not reach the issue of *supplemental* jurisdiction because we hold that the district court properly exercised *original* jurisdiction over this claim under 39 U.S.C. § 409(a). Nonetheless, the claim was properly dismissed because it is preempted by federal law.

### A

We first consider the district court's jurisdiction. Subject to certain inapplicable exceptions, 39 U.S.C. § 409(a) provides that "the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service." The plain language of this statute grants United States district courts original jurisdiction over lawsuits by or against the Postal Service, as other circuits have held. *E.g. Licata* v. *United States Postal Serv.*, 33 F.3d 259, 260-62 (3d Cir. 1994); *Cont'l Cablevision of St. Paul, Inc.* v. *United States Postal Serv.*, 945 F.2d 1434, 1437-41 (8th Cir. 1991); *Am. Postal Workers Union* v. *United States Postal Serv.*, 830 F.2d 294, 312 n.33 (D.C. Cir. 1987).

We would stop our discussion here, except for the need to clarify an arguable inconsistency in our cases interpreting 39 U.S.C. § 409(a). In *Janakes* v. *United*

*States Postal Service*, 768 F.2d 1091, 1093 (9th Cir. 1985), we quoted and adopted the Seventh Circuit's holding in *Peoples Gas, Light & Coke Co.* v. *United States Postal Service*, 658 F.2d 1182, 1189 (7th Cir. 1981), that § 409(a) "does not confer subject matter jurisdiction for actions in which the [Postal] Service is a party, but requires a 'substantive legal framework' of federal law to confer federal subject matter jurisdiction." According to *Peoples Gas* and *Janakes*, § 409(a) "merely removes the barriers of sovereign immunity." *Id.* Later, without citing *Janakes*, we held in *Wright* v. *United States Postal Service*, 29 F.3d 1426, 1430 (9th Cir. 1994), that "39 U.S.C. § 409(a) . . . grants the district courts original but not exclusive jurisdiction over actions by or against the USPS." *See also Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1035 & n.1 (9th Cir. 1991) (per curiam) (citing without discussion § 409(a) as a basis for jurisdiction).

A careful reading of our cases reveals that no true inconsistency exists because *Janakes* is distinguishable. In *Janakes*, the issue we decided was whether § 409(a) created a substantive right to bring suit. *See Janakes*, 768 F.2d at 1093. We held it did not. *Id.* Although some language in *Janakes* suggests that § 409(a) does not confer subject matter jurisdiction, that language is dicta. Indeed, the Seventh Circuit, which in *Peoples Gas* created the decision that prompted our *Janakes* language, later adopted a reading of *Peoples Gas* consistent with the reading we now apply to *Janakes*. *See Powers* v. *United States Postal Serv.*, 671 F.2d 1041, 1042 (7th Cir. 1982). We are satisfied that our reading, following *Wright*, is correct. The plain language of § 409(a) states that the district courts "shall have original jurisdiction"—the same words used to grant



jurisdiction elsewhere in the United States Code. *E.g.* 28 U.S.C. §§ 1331, 1332.

We hold that the district court correctly exercised original subject matter jurisdiction under 39 U.S.C. § 409(a) over Flamingo's claim asserted under California Business & Professions Code § 17200.

B

The district court's dismissal of the California Business & Professions Code § 17200 claim was proper, however, because that claim is preempted by federal law. The district court did not reach this issue, but we may affirm on any ground supported by the record. *See Laboa* v. *Calderon*, 224 F.3d 972, 981 n. 7 (9th Cir. 2000).

Preemption comes in several forms. Here we are concerned with conflict preemption, by which "state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' . . . , or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), and *Hines* v. *Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).

The state law at issue, California Business & Professions Code § 17200, is a notoriously broad statute. It applies to, among other things, "any unlawful, unfair or fraudulent business act or practice." Here, Flamingo is using the section to challenge procurement decisions

made by the Postal Service involving the Postal Service's requirements for mail bags. This use of section 17200 conflicts with federal law.

The Postal Service is expressly authorized by 39 U.S.C. § 401(3) to determine the character and necessity of its expenditures. And, although 28 U.S.C. § 1491(b)(1) allows for challenges to Postal Service procurement decisions, 28 U.S.C. § 1491(b)(4) provides that such decisions may only be invalidated by a federal court applying the deferential APA standard of review codified at 5 U.S.C. § 706 (for example, if the procurement decision is arbitrary and capricious). Allowing the requirements of California Business & Professions Code § 17200 to control the Postal Service's procurement decisions would impinge upon the Service's right to control the character and necessity of its purchases free from state constraint, and would negate the deferential standard Congress has created for federal court review of such decisions. *Cf. United States* v. *City of Pittsburg, Cal.*, 661 F.2d 783, 785-86 (9th Cir. 1981) (holding that a local ordinance requiring letter carriers to obtain consent before crossing lawns was preempted by a Postal Service regulation allowing mail carriers to cross lawns unless the owner objects because of the clear conflict between the two provisions). Flamingo's claim asserted under California Business & Professions Code § 17200 is preempted by federal law.

V

THE § 1983 CLAIM

The Postal Service argues that we should dismiss Flamingo's 42 U.S.C. § 1983 claim for failure to state a claim upon which relief can be granted. We agree. The Postal Service acts under federal law, and § 1983 does not allow for a suit based upon actions taken under



color of federal law. *Billings* v. *United States*, 57 F.3d 797, 801 (9th Cir. 1995). Exercising our authority to affirm on any ground supported by the record, we dismiss with prejudice the § 1983 claim.

VI

VENUE

The district court, after dismissing the federal antitrust claims and the breach of implied covenant claim, dismissed the Procurement Manual, California Business and Professions Code § 17200, and 42 U.S.C. § 1983 claims for improper venue. It held that 15 U.S.C. § 22 did not support venue for these claims once the antitrust claims were dismissed.

Section 22 states:

> Any suit, action, or proceeding *under the antitrust laws* against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22 (emphasis added).

We have held earlier in this opinion that the district court erred in dismissing the antitrust claims on the ground of sovereign immunity. We now hold that under 15 U.S.C. § 22, venue for the antitrust claims was proper in the Northern District of California because the Postal Service may be found in, and transacts business in, that district. *See id.*

Because venue is proper in the Northern District of California for the antitrust claims, and because the Procurement Manual, § 17200, and § 1983 claims arise out

of the same common nucleus of facts, venue in the Northern District was proper for these claims as well. *See Beattie* v. *United States*, 756 F.2d 91, 100-104 (D.C. Cir. 1984), *overruled on other grounds in Smith* v. *United States*, 507 U.S. 197, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993); *Seattle Audubon Soc'y* v. *Lyons*, 871 F. Supp. 1286, 1290 (W.D. Wash. 1994). However, for alternative reasons previously discussed, we have affirmed the dismissal of the § 17200 and § 1983 claims. We now reverse the district court's dismissal of the Procurement Manual claim for improper venue.

VII

CONCLUSION

We reverse the district court's dismissal of Flamingo's antitrust claims and Procurement Manual claim. We affirm the district court's dismissal of Flamingo's claim for breach of the implied covenant of good faith and fair dealing, and its dismissal of the claims asserted under California Business & Professions Code § 17200 and 42 U.S.C. § 1983. The parties shall each bear their respective costs for this appeal.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.



**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Civil Action No. C 00-2484 MMC

FLAMINGO INDUSTRIES (U.S.A.), LTD., AND ARTHUR WAN, PLAINTIFFS

*v.*

U.S. POSTAL SERVICE, ET AL., DEFENDANTS

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[Filed: March 19, 2001]

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**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; VACATING HEARING**

Before the Court is defendant United States Postal Service's motion to dismiss or, in the alternative, for summary judgment. Having considered the papers submitted in support of and in opposition to the motion, the Court deems the matter appropriate for decision on the papers, VACATES the hearing scheduled for March 16, 2000 and rules as follows.

**A. Antitrust Claims**

Defendant argues plaintiffs cannot state a claim against it under the antitrust laws. Federal instrumentalities are not liable under the antitrust laws. *See Sakamoto* v. *Duty Free Shoppers, Ltd.*, 764 F.2d 1285,

1288 (9th Cir. 1985); *Sea-Land Service, Inc.* v. *Alaska Railroad*, 659 F.2d 243, 246 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982). Defendant is an instrumentality of the federal government. *See Silver* v. *United States Postal Service*, 951 F.2d 1033, 1035 (9th Cir. 1991). While the "sue and be sued" clause set forth in 39 U.S.C. § 401(1) constitutes a general waiver of sovereign immunity, *see Pereira* v. *United States Postal Service*, 964 F.2d 873, 876 (9th Cir. 1992), such language cannot serve to subject defendant to liability under the antitrust laws as "there was no attempt on the part of Congress to impose liability in the first place." *See E.W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52, 56 (1st Cir.), cert. denied, 385 U.S. 947 (1966) (holding "sue and be sued" clause in statute creating Massachusetts Port Authority did not subject it to antitrust laws). Accordingly, defendant's motion to dismiss Counts One through Five (antitrust claims) for failure to state a claim is hereby GRANTED.

**B. Non-Antitrust Claims**

With respect to the non-antitrust claims, defendant raises challenges under Rules 12(b)(1), 12(b)(3), 12(b)(6) and 56 of the Federal Rules of Civil Procedure. The Court will consider the jurisdictional and venue challenges under Rules 12(b)(1) and 12(b)(3), respectively, before addressing the merits of plaintiff's claims under Rules 12(b)(6) and 56. *See Arrowsmith* v. *United Press Int'l*, 320 F.2d 219, 221 (2nd Cir. 1963) (holding district court erred in dismissing action for failure to state a claim prior to addressing issues of jurisdiction and venue).



**1. Jurisdiction**

Defendant does not challenge the Court's jurisdiction as to Count Nine (42 U.S.C. § 1983). Defendant does challenge the Court's jurisdiction as to Counts Six (California Business & Professions Code § 17200), Seven (violation of procurement manual), and Eight (breach of implied covenant of good faith and fair dealing).

The Court has jurisdiction over Counts Six and Seven. *See* 39 U.S.C. § 409(a) (providing district courts with original jurisdiction over all actions brought by or against the Postal Service); *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 514-515 (1984) (addressing claim brought against Postal Service under state tax laws, where federal jurisdiction invoked pursuant to § 409(a)). Accordingly, defendants' motion to dismiss Counts Six and Seven for lack of jurisdiction is hereby DENIED.

With respect to Count Eight, defendant interprets the claim as one by which plaintiffs seek tort remedies, and plaintiffs make no argument to the contrary. The Federal Torts Claim Act ("FTCA") applies "to tort claims arising out of the activities of the Postal Service." *See* 39 U.S.C. § 409(c). Exhaustion of administrative remedies under the FTCA is a jurisdictional prerequisite to suit. *See Jerves* v. *United States*, 966 F.2d 517, 518-519 (9th Cir. 1992). "A tort claimant may not commence proceedings in court against the United States without first filing [a] claim with the appropriate federal agency and either receiving a conclusive denial of the claim from the agency or waiting for six months to elapse without a final disposition of the claim being made." *Id.* at 519. Plaintiffs have not alleged such exhaustion, and leave to amend would be futile because

plaintiffs do not dispute defendant's evidence as to lack of exhaustion, (*see* Eaves Decl. at ¶¶ 2-4), and further state "no claim was required to be submitted by the plaintiffs." (*See* Pls. Opp. at 14:19.) Accordingly, defendant's motion to dismiss Count Eight for lack of jurisdiction is hereby GRANTED.

**2. Venue**

As to the remaining non-antitrust claims, Counts Six, Seven, and Nine, venue is proper in this district only if plaintiffs establish that "a substantial part of the events or omissions giving rise to the claim occurred" in the Northern District of California. *See* 28 U.S.C. § 1391(e)(2).[1] In their opposition, plaintiffs do not discuss how they can establish venue under § 1391(e)(2), and instead rely exclusively on 15 U.S.C. § 22, which addresses venues for antitrust claims.[2] Plaintiffs' antitrust claims, however, have been dismissed. Accordingly, defendant's motion to dismiss Counts Six, Seven, and Nine for improper venue is hereby GRANTED.

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[1] Because defendant is a resident of the District of Columbia, *see* 39 C.F.R. § 2.3, and plaintiffs allege they are residents of Illinois, (*see* Compl. at ¶¶ 2, 3), venue is not proper under either 28 U.S.C. § 1391(e)(1) or (e)(3).

[2] Moreover, neither the allegations in the complaint nor the evidence before the Court suggests venue is proper in this district under § 1391(e). Plaintiffs challenge decisions made by defendant's agents in the District of Columbia, (*see* Wan Decl. Ex. A-H), specifically, decisions to terminate Flamingo's contracts with defendant and to prevent Flamingo from prevailing on subsequent bids. (*See, e.g.*, Compl. at ¶¶ 16, 20-29.) Plaintiffs allege these decisions violated the non-antitrust federal and state laws in question. (*See id.* at ¶¶ 51-73).



**CONCLUSION**

For the reasons stated, defendant's motion to dismiss in GRANTED.

The Clerk shall close the file.

**IT IS SO ORDERED.**

/s/ MAXINE M. CHESNEY
MAXINE M. CHESNEY
United States District Judge

Dated: March 19, 2001

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 01-15963

D.C. No. C00-2484 MMC

FLAMINGO INDUSTRIES (USA) LTD. AND ARTHUR WAH, PLAINTIFFS-APPELLANTS

*v.*

UNITED STATES POSTAL SERVICE, DEFENDANT-APPELLEE

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[Filed: Nov. 4, 2002]

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**ORDER**

Before: LAY,* THOMPSON, and TALLMAN, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellee United States Postal Service's petition for rehearing. Judge Tallman has also voted to deny its petition for rehearing by the court en banc, and Judges Lay and Thompson have recommended that that petition be denied.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has

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* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.



requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

## APPENDIX D

1. 15 U.S.C. 7 provides:

**§ 7. "Person" or "persons" defined**

The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

2. 15 U.S.C. 12(a) provides:

**§ 12. Definitions; short title**

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States,



or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

* * * * *

3. 39 U.S.C. 101 provides:

**§ 101. Postal policy**

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

(b) The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices

are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.

(c) As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States.

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

(f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service. Modern methods of transporting mail by containerization and programs designed to achieve overnight transportation to the destination of important letter mail to all parts of the Nation shall be a primary goal of postal operations.

(g) In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equipment designed to create desirable working



conditions for its officers and employees, a maximum degree of convenience for efficient postal services, proper access to existing and future air and surface transportation facilities, and control of costs to the Postal Service.

4. 39 U.S.C. 201 provides:

**§ 201. United States Postal Service**

There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.

5. 39 U.S.C. 401 provides:

**§ 401. General powers of the Postal Service**

The Postal Service shall have the following general powers:

(1) to sue and be sued in its official name;

(2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;

(3) to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures;

(4) to determine and keep its own system of accounts and the forms and contents of its contracts and other business documents, except as otherwise provided in this title;

(5) to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest

therein; and to provide services in connection therewith and charges therefor;

(6) to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by it, including, without limitation, any property or interest therein transferred to it under section 2002 of this title;

(7) to accept gifts or donations of services or property, real or personal, as it deems, necessary or convenient in the transaction of its business;

(8) to settle and compromise claims by or against it;

(9) to exercise, in the name of the United States, the right of eminent domain for the furtherance of its official purposes; and to have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates; and

(10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.